VADIVELOO MUNUSAMY

v.

GENERAL TYRE RETREADERS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R3-25-57-1999]
22 SEPTEMBER 1999

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - Industrial Court - Award - Remittance from High Court - Industrial Court failed to follow High Court order on compensation - Whether Industrial Court breached High Court order*

LABOUR LAW: *Industrial Court - Remittance from High Court - Industrial Court failed to follow High Court order on compensation - Whether Industrial Court breached High Court order*

The applicant's claim for dismissal without just cause and excuse was dismissed in the Industrial Court. The applicant applied to the High Court and the High Court found for the applicant. The High Court remitted the case back to the Industrial Court to determine whether the applicant ought to be reinstated or compensated *in lieu* thereof. The High Court also ordered that the Industrial Court award backwages, allowances and benefits due to the applicant. Pursuant to the High Court order, the Industrial Court heard the case and ordered that the proper remedy was not reinstatement but compensation *in lieu* thereof and awarded a global sum of RM45,000. Dissatisfied with the said award, the applicant applied for an order of *certiorari* on the basis that the Industrial Court failed to determine the quantum of backwages, allowances and benefits due to him.

Held:

[1] When the High Court decided that the appropriate remedy for the dismissal without just cause and excuse was compensation *in lieu* of reinstatement, the Industrial Court, to that extent, had followed the order of the High Court. Thereafter the Industrial Court had departed from the order of the High Court and gone on to take into account irrelevant consideration as to the general powers of the Industrial Court in determining remedies. This was clearly a breach of the direction in the order of the High Court.

[1a] The Industrial Court failed to determine the quantum of backwages, allowances and benefits due to the applicant arising out of his unfair dismissal. The Industrial Court further failed to determine the quantum of compensation *in lieu* of reinstatement due to the applicant. Instead, the Industrial Court ordered the payment of a global sum of RM45,000 which was far less than what the learned judge of the High Court contemplated in his order.

[Backwages RM21,956 & compensation RM12,023 subject to deduction for EPF and income tax wherever applicable. Order in terms of (i) and (ii) of plaintiff's application.]

Case(s) referred to:

HM Shah Enterprises Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers [1990] 1 ILR 263 ***(refd)***

Great Eastern Mills Bhd v. Ng Yuen Ching [1998] 3 CLJ 847 ***(refd)***

General Tyre Retreaders Sdn Bhd v. Vadiveloo Munusamy [1996] 2 ILR 1419 ***(refd)***

General Tyre Retreaders Sdn Bhd v. Vadiveloo Munusamy [1999] 1 ILR 591 ***(refd)***

For the applicant - S Muhendaran; M/s Murugavell Arumugam & Co

For the respondent - Jacqueline Ann Christie; M/s Ng Yook Woon, Andrew TC Saw & Co

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:

This is an application by Vadiveloo Munusamy ('the applicant') for an order of *certiorari* to quash the decision of the Industrial Court in *General Tyre Retreaders Sdn Bhd v. Vadiveloo Munusamy* [1999] 1 ILR 591, Award No. 161 of 1999 (the impugned award) in Industrial Court case No. 4/4-225/94 (see exh. VM-11 in encl. 1). The grounds for this application are as follows:

(a) The Industrial Court in the impugned award acted without any jurisdiction when it ignored the direction of the High Court (see p. 14 of Exhibit VM-3 in encl. 1) to award whatever backwages was due to the applicant.

(b) The Industrial Court in the impugned award acted without jurisdiction when it failed to act in accordance with the direction of the High Court to assess the quantum of compensation to be paid to the applicant if reinstatement is not the appropriate remedy.

(c) The Industrial Court in the impugned award acted without jurisdiction when it awarded a global sum of RM45,000 which, taking into account

the backwages due to the applicant and without demarcating the backwages already due to the applicant and the compensation to be awarded *in lieu* of reinstatement, is grossly inadequate.

The facts of this application is narrated in the applicant's affidavit (encl. 1). However, for ease of reference the brief facts are as follows:

(a) The Industrial Court handed down in *General Tyre Retreaders Sdn Bhd v. Vadiveloo Munusamy* [1996] 2 ILR 1419, Award No. 532/1996 (see exh. U-1 in encl.1) on 13 November 1996 where the applicant's claim for reinstatement was dismissed.

(b) The applicant was dissatisfied with the Industrial Court's decision and thus made an application to quash the Award No. 532/1996.

(c) The High Court on 14 October 1998 quashed the *General Tyre Retreaders Sdn Bhd v. Vadiveloo Munusamy* [1996] 2 ILR 1419 *(*Award No. 532/1996) and also made a consequential order that the applicant's dismissal was without just cause or excuse and case No. 4/4-225/94 was to be remitted back to the Industrial Court only to determine whether the applicant ought to be reinstated in his former employment and if not to assess appropriate compensation *in lieu* to be paid to the applicant and also to award whatever backwages, allowances and other benefits due to the applicant. (See exh. U-2 and U-3 in encl. 1).

(d) Pursuant to the High Court Order dated 14 October 1998 the Industrial Court on 26 March 1999 heard case No. 4/4-225/94 to determine the appropriate remedy that ought to be accorded to the applicant.

(e) The Industrial Court handed down the impugned award dated 10 April 1999, wherein the Industrial Court made a decision that reinstatement was not an appropriate remedy based on the circumstances of the case and made a global award in the sum of RM45,000 as just and equitable to compensate the applicant for loss of employment. (See exh. V-11 in encl.1)

The relevant part of the order of the High Court dated 25 September 1998 (p. 14 of exh. V-13 in encl. 1) is as follows:

> In the circumstances, on the principle of *R Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, I remit the matter back to the Industrial Court only to determine whether the applicant ought to be reinstated in his former employment with the Respondent and if not, to assess appropriate compensation *in lieu* to be paid to him, and also to award whatever backwages, allowances and other benefits due to him on account of the wrongful dismissal.

It is now accepted in law that the High Court can go on to decide on the merits of a case rather than merely quash an impugned decision of an inferior tribunal. Thus, Abdul Kadir bin Sulaiman J quashed the decision of the Industrial Court in Award No. 532/1996. Having done so he decided on the merit that the dismissal of the applicant in that case was without just cause or excuse. He then remitted back the case to the Industrial Court to decide on the appropriate remedy for the dismissal without just cause or excuse *ie,* whether the appropriate remedy was to be reinstatement or compensation *in lieu* of reinstatement and if it was to be compensation *in lieu* of reinstatement, to assess appropriate compensation to be paid. The learned judge did not remit to the Industrial Court the question of whether backwages, allowances and other benefits were to be paid. In fact the order of the learned judge of the High Court was that the Industrial Court should award all such backwages, allowances and benefits. What was left for the Industrial Court to decide in this area was only the computation of the amount of monies due as backwages, allowances and benefits. Obviously he could not himself compute the amount due to lack of material facts on monies due.

At p. 5 of the impugned award (see exh. U-11 of encl. 1) the Industrial Court concludes, thus:

> In considering reinstatement the Court is also obliged to take into account the practicability of ordering reinstatement and whether it is proper or expedient in making such an order. In some cases, the relief of compensation *in lieu* would meet the ends of justice. The instant case is one such exception.

The Industrial Court has thus far followed the order of the learned judge of the High Court and decided that the proper remedy was not reinstatement but compensation *in lieu* of reinstatement. Thereafter the Industrial Court had departed from the order of the High Court and gone on to take into account irrelevant consideration as to the general powers of the Industrial Court in determining remedies. This was clearly a breach of the direction in the order of the High Court. The Industrial Court failed to determine the quantum of backwages, allowances and benefits due to the applicant arising out of his unfair dismissal.

The Industrial Court further failed to determine the quantum of compensation *in lieu* of reinstatement due to the applicant. The Industrial Court in disregard of the order of the High Court and relying on general principles of law as exposed in the *Hotel Jaya Puri* case went ahead and ordered the payment of a global sum of RM45,000 which was far less than the learned judge of the High Court contemplated in his order.

It is noted here that the learned judge in his 'perintah' of 14 October 1998 ordered the following:

> Adalah diperintahkan bahawa suatu perintah *Certiorari* dikemukakan untuk membatalkan keputusan Mahkamah Perusahaan No. 532/96 bertarikh 13.11.96 dan bahawa suatu perintah *Mandamus* dikeluarkan untuk mengarahkan Mahkamah Perusahaan supaya mendengar dan memutuskan samada pemohon harus diambilbalik bekerja oleh responden dan sekiranya tidak, untuk menilaikan gantirugi yang patut dibayar kepada pemohon dan juga sebarang gaji tunggakan, elaun-elaun dan kelebihan yang lain kepada pemohon. Adalah akhirnya diperintahkan bahawa kos permohonan ini dibayar oleh pihak responden kepada pemohon.

And in his grounds of judgment the learned judge stated, "I remit the matter back to the Industrial Court only to determine whether the applicant ought to be reinstated in his former employment with the respondent and if not to assess appropriate compensation *in lieu* to be paid to him and also to award whether backwages, allowances and other benefits due to him an account of the wrongful dismissal. Cost to applicant".

As a court equity and good conscience, I have to take into account the following factors and in consequence scale down the calculation of the backwages and compensation *in lieu* of reinstatement.

Delay Factor

Claimant's dismissal	8 December 1993
	(gap = 5 months)
Minister's reference	31 May 1994
First mention at Industrial Court	23 June 1994
(Claimant was supposed to file statement of case by 14 July 1994)	(gap = 6 months)
Filing of statement of case at Industrial Court	14 January 1995
Filing of statement in reply (SIR)	21 January 1995
	(gap = 6 months)
Claimant raised preliminary Objection to SIR's doc and forwarded Supp Bundle of Doc to Company	6 November 1995
Hearing of the Preliminary Objections	8 November 1995
	(gap = 6½ monts)

Hearing proper of the case	23 & 24 May 1996 (gap = 6 months)
Industrial Court Award	13 November 1996 (gap = 6 months)
At High Court	
Service of *ex parte* notice of motion for extension of time to apply for leave to apply for *Certiorari*	6 June 1997
Hearing of application for extension	20 August 1997
Hearing of application for leave	9 September 1997
Service of notice of motion for *Certiorari*	7 October 1997 (gap of 2 months)
Hearing of *Certiorari*	10 December 1997
Filing of written submissions: By Claimant	4 February 1998
By Company/Respondent By Claimant	23 February 1998 (gap of about 8 ½ months)
Handing down of decision of the High Court dated 25 September 1998	14 October 1998 (gap of about 5 months)
Hearing of remission before learned Chairman	23 March 1999

It is observed that from the time claimant was dismissed till hearing before Industrial Court on 26 March 1999 = 5 years 3 months. It must be remembered that the monetary award *in lieu* of reinstatement is meant only to compensate the claimant and not to inflict the maximum financial punishment on the respondent. The financial problems faced by the respondent was brought up before the chairman and is evident in the reports and accounts placed before the chairman in the respondent company's bundle of documents (exh. VM4 in encl. 2). The fact that the respondent was facing severe financial problems was the truth and, importantly, had not been contradicted by the applicant. The respondent's explanation of the salient points in the financial documents are contained in the affidavit in reply of Wong Choon Hane. In *Great Eastern Mills Bhd. v. Ng Yuen Ching* [1998] 3 CLJ 847; [1998] 6 MLJ 214, Nik Hashim J said:

> The doctrine of damages does not apply to industrial adjudication. ... However, scaling down the backwages or limiting it to two years because the workman was in gainful employment is not an application of the mitigation principle. The income earned by the workman elsewhere during the period of his enforced unemployment will be the relevant factors to be taken into account in denying or scaling down quantum of backwages ....

In the instant case, the claimant admitted that he started work in February 1995 with Atlas Chemical. This appeared in his counsel's letter dated 14 December 1998 (see p. 1 company respondent's bundle of document - exh. VM-4 encl. 1).

Therefore:

(i) Backwages is calculated:

RM919 (last drawn monthly salary) x 24 months = RM21,956 because it is simply unfair to award backwages for the entire delay of 5 years and 3 months or longer because the court has to limit the calculation of backpay to at most to 24 months, in line with the directive in Practice Note 1 of 1987, and the last drawn salary should be the right basis on which backwages is calculated.

Therefore it is inequitable to take into account any annual increments.

(ii) Compensation *lieu* of reinstatement should only be a month's salary for each completed year of service. (See *HM Shah Enterprises Sdn Bhd v. National Union of Hotel, Bar and Restaurant Workers* (Award No. 81 of 1990). It was undisputed that the claimant began working with the respondent on 16 June 1976. Therefore the calculation should only be up to 8 December 1993, the date of claimant's dismissal, and not to the hearing of remission before the learned chairman. The amount works out approximately to be:

RM919 x 17 years = RM12,023
[16 June 1976 - 8 December 1993]

In the circumstances of the case, I hereby made the following order: Backwages RM21,956 and compensation RM12,023 subject to deduction for EPF and income tax wherever applicable. Order in terms of (i) and (ii) of the application.